MOTION FILED
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(2)

No. 04-1282

In the

Supreme Court of the United States

TIEN FU HSU, et al.,

Petitioners,

v.

COUNTY OF CLARK,
a political subdivision of the State of Nevada,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS TIEN FU HSU, ET AL.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), Pacific Legal Foundation moves to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. Consent has been received from Petitioners and that consent has been lodged with this Court. Respondents, however, have withheld consent thus necessitating the filing of this motion.

INTEREST OF AMICUS CURIAE AND REASONS FOR GRANTING THIS MOTION[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 32 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

In the present case, Pacific Legal Foundation is particularly interested in providing additional reasons why this Court should accept the petition for writ of certiorari in this case in order to resolve the conflict in the state and lower federal courts over the question of airport-related takings of private property through height limitations. In particular, the attached amicus curiae brief will explain that when a governmental airport authority prohibits the private use of useable and buildable airspace above a parcel of private property for the purpose of facilitating incursions by jet airplanes, then the airport has physically invaded that airspace for its own entrepreneurial purposes. While a number of state courts have held that compensation must be paid in these circumstances, other courts, such as the Nevada Supreme Court, have found there to be no physical invasion unless there is also nuisance-like activity. The accompanying brief amicus curiae suggests that this is a serious conflict that should be resolved by this Court.

For these reasons, Pacific Legal Foundation respectfully requests permission to file the attached brief amicus curiae.

DATED: April, 2005.

Respectfully submitted,

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QUESTION PRESENTED

Clark County, Nevada, as owner and operator of the commercial jet airport serving Las Vegas, enacted laws that require property owners adjacent to its airport to set aside large amounts of valuable airspace (the kind of property used by others in the vicinity for the construction of major high rise hotels) to accommodate airport operations and to permit the occasional physical use of the airspace by pilots who need a bit more maneuvering room on approach or departure than the county had purchased to provide for that purpose.

The question presented is:

When government action requires owners of private property to allow aircraft to enter their airspace on an ad hoc basis so that the airspace must be set aside for the operation of an airport and the incursion by jet aircraft, has the government physically taken property requiring just compensation under the 5th Amendment?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 32 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 25 years. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.[1]

SUMMARY AND INTRODUCTION

The Petition for Writ of Certiorari in this case raises the important and unsettled question of whether the episodic invasion of airspace above Petitioners' property, an invasion that led to a 35 foot height limitation, constitutes a physical invasion taking for which compensation is owed. There is some confusion and disagreement in the state courts over the

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[1] Pursuant to this Court's Rule 37.2(a), Petitioners consented to the filing of this brief and a letter of consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

proper demarcation between physical invasions—which always implicate the Takings Clause—and allegations of regulatory takings—which more often than not require a weighing of relevant factors to determine whether relief is available under the Takings Clause of the United States Constitution.[2] The Nevada Supreme Court in this case downplayed the significance of the requirement that Petitioners suffer the uninvited intrusion of their airspace by commercial jet aircraft. Rather, the court focused its attention on the 35 foot height restriction, finding that it led to the unproven potential of a regulatory taking and nothing more.

The Nevada Supreme Court's decision to abjure a physical invasion analysis in favor of a *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), balancing test might be appropriate if the County were not using Petitioners' property for its own entrepreneurial reasons—namely the use of Petitioners' airspace for the flight path of straying jet airplanes. Indeed, the airport could no more operate without this airspace than it could operate without a runway and control tower. In other words, the particular airspace that lies above Petitioners' property is part and parcel of the airport and is set aside for the sole purpose of accommodating airport operations. For that reason, this case does *not* resemble the typical height limitation associated with a zoning ordinance. The animating reason for *this* height restriction is not derived from the typical zoning ordinance concerns of aesthetics, density, or infrastructure limitations. In light of the other massive buildings only a short distance from Petitioners' property, aesthetics, and density concerns could not be, and were not alleged to be, the rationale for the height restrictions here. Rather, the height limitation's

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[2] The Takings Clause of the United States Constitution is made applicable to the states through the Fourteenth Amendment. *See, e.g., Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

sole purpose was to accommodate those jet airplanes that may stray into Petitioners' airspace.

The court below, however, took its cue from those physical invasion cases that arose from nuisance-like physical invasions of airspace such as *United States v. Causby*, 328 U.S. 256 (1946). While the noise and problems associated with low-flying aircraft may have helped distill this Court's reasoning in *Causby*, since that case there has been a host of physical invasion cases from this and other courts where the *sine qua non* of a physical invasion has much less to do with nuisance than with the simple fact that a landowner's property has been *physically* invaded—with or without any accompanying noise, nuisance, or even serious inconvenience.

Yet, the trend persists in many state courts that for there to be an aviation-induced physical invasion of airspace, there must also be nuisance-like activities. Other courts, however, have properly focused not on the extent of any nuisance-like injuries caused by the physical invasion but instead on the nature of the uninvited invasion of a landowner's airspace by third parties. As will be shown below, it is appropriate for this Court to grant the Petition for Writ of Certiorari in order to resolve this question.

REASONS FOR GRANTING THE PETITION

I

WHERE LANDOWNERS MUST SUBMIT TO THE ENTRY OF UNINVITED STRANGERS UPON THEIR PROPERTY AND THE CONCOMITANT INTERFERENCE WITH THE USE OF THE PROPERTY, THE OWNERS' DOMINION INTERESTS HAVE BEEN SERIOUSLY COMPROMISED

There are important reasons why most courts traditionally have been very solicitous to landowners who are seeking to keep strangers at bay and off of their private property. At the heart of property jurisprudence is the principle that landowners have a fundamental right to control the dominion of their land. Indeed, the idea that land becomes the dominion of its owner, and a place where the power of outside society and the government can be limited, animates much of the early common-law writing on property. As William Blackstone put it:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 William Blackstone, *Commentaries on the Laws of England* *2 (1765-1769).

As noted often by this Court, in English law, a man's home is his castle:

> In1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against

injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In his Commentaries on the Laws of England, William Blackstone noted that

> "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).

Wilson v. Layne, 526 U.S. 603, 609-10 (1999).

While the common law of property has necessarily evolved since the days when Lord Coke declared that property is owned from the center of the earth to the center of the universe,[3] the fundamental concept that an owner has the right to exclude the world from his property has remained.

The question that continues to vex the courts such as the Nevada Supreme Court, however, is when does an intrusion upon the airspace above an owner's land constitute an invasion of these fundamental principles of dominion? Certainly, no one today seriously entertains the notion that a flight at 30,000 feet affects in any meaningful way the rights of a landowner. And few people dispute that a constant intrusion by multiple jet airplanes at a few dozen feet constitutes an actionable invasion

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[3] "Cujus est solum ejus est usque ad coelum." 1 Coke, *Institutes*, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, *Commentaries*, Lewis Ed. 1902, p. 18; 3 Kent, *Commentaries*, Gould Ed. 1896, p. 621. As cited in *United States v. Causby*, 328 U.S. at 260-61, 261 n.5.

of the owner's right to exclude as well as the right to the quiet enjoyment of the property. But it is the intersection of the right to exclude with the ownership of the *useable* airspace that is implicated in cases such as the present one.

When this question is viewed in the context of an owner's dominion over his property, one must look further at the meaning of dominion. In the context of land ownership, dominion encompasses an owner's right to control the users and the use of the property—the power to control the borders of the property as well as the uses to which the property may be put. A case that involves an interference with *both* of these elements is more likely to constitute a prohibited interference with the owner's dominion interests than a situation where only one element is implicated. Thus, a typical regulation that limits the height and size of a building is not necessarily a prohibited invasion of dominion interests so long as the owner may continue to exclude the public.[4] And a regulatory action that requires a landowner to suffer limited third party incursions is less likely to interfere with dominion interests than a regulation that at the same time also interferes with the *use* of property. An example would be the involuntary acceptance of petition-gatherers in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where the primary use of the property as a shopping mall was not burdened. But a governmental action that affects *both* the right to exclude third parties *and* adversely impacts the owner's ability to use his property is far more likely to unduly interfere with his dominion interests—especially when an important use by the landowner is taken in order to accommodate a use by the government.

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[4] Of course, the greater the interference with the use of a property, even without the invasion by third parties, the greater the implications are for dominion interests. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Thus, in *Causby* there was both the incursion by airplanes and destruction of the use of the property as a chicken farm, leading to this Court's finding that there was a physical invasion. Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), there was both a physical incursion by the public and the conversion of the use of the canal as a private waterway into a public waterway. And *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), involved both an unwanted incursion by third parties and the inability to use a small portion of the owner's apartment building for exclusively private purposes.

In the present case, both elements of the owners' dominion interests are adversely affected. The obvious preferred and highest and best use of the property would be to build a resort hotel of similar size and stature as many of the others within a very short distance of this property. But because the owners are required to acquiesce to incursions by large jet airplanes they are unable to put their property to the desired use. Instead, the airspace is being used for airport operations and the owners' dominion interests have been implicated.

While some courts reach results that are in accord with the preservation of an owner's dominion interests, the court below, like a number of other courts, focused only on whether the incursions also caused nuisance-like effects. Absent such effects, it found no physical invasion. An analysis of the conflict in the state and lower federal courts that exists on the question of the takings implications of airspace incursions reveals that the reasoning of these courts is often seriously lacking in an understanding of the nature of the fundamental property interests that are impacted in these cases. This is a misunderstanding and conflict that only this Court can effectively resolve.

II

THIS COURT CAN RESOLVE THE CONFLICTS IN THE STATE AND LOWER FEDERAL COURTS BY GRANTING THE PETITION FOR WRIT OF CERTIORARI AND ADDRESSING THE REASONS FOR APPLYING THE DOCTRINE OF PHYSICAL INVASIONS TO AIRSPACE INCURSIONS

Petitioners, as well as the Court below, point out the existence of a conflict in the state and lower federal courts. *See County of Clark v. Hsu*, No. 38853, slip op. at 36 n.88 (Nev. Sept. 30, 2004), and Petition for Writ of Certiorari at 8-12.

Many of the courts that have ruled that landowners are entitled to compensation when airports impose height restrictions speak in terms of the taking of the *useable* airspace. Thus, the Indiana Supreme Court notes that "a landowner is also the owner of the air space above his property, *at least to the extent that such air space may reasonably be used by him.*" *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237, 239 (Ind. 1963) (emphasis added). The court rightly distinguished the case from those of ordinary height limitations or setbacks, noting that here the defendant sought "to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation." *Id.* at 241. This taking of the "use" of the airspace clearly implicates the concerns of dominion that were absent from the decision of the Nevada Supreme Court.

Likewise, the Idaho Supreme Court held that "a landowner has a property right in the reasonable use of the airspace above his land which cannot be 'taken' for public use without just compensation." *Roark v. City of Caldwell*, 394 P.2d 641, 645 (Idaho 1964). Because the airport-related height restrictions caused a substantial loss in value, and because property consists

of "'the unrestricted right of use, enjoyment and disposal'" the court found a taking. *Id.* at 646 (citation omitted).

In *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), after noting that when height restrictions facilitate the actual use of the airspace there is an invasion or trespass, the Minnesota Supreme Court held:

> [T]hat where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.

Id. at 258-59.

The Minnesota court relied upon a California Court of Appeal decision which contains a cogent understanding of the nature of airport-related height restrictions:

> We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

Sneed v. County of Riverside, 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318, 320 (Ct. App. 1963). This *contemplation of actual use* clearly implicates the loss of dominion experienced by the affected landowner.

It is the understanding of the implications of the actual use of airspace that is lacking in the decision of the Nevada Supreme Court and those other state courts that it cites in its decision. *See* slip op. at 37 n.89. By forcing the landowners here to acquiesce to jet airplanes flying into the space where the

owners seek to construct a building, the landowners have suffered a physical invasion that is no less serious than the invasion in *Loretto* or *Kaiser Aetna*. While not all the state court decisions finding for the landowners in these cases speak in terms of "physical invasion," there is the common understanding that the loss of *use* caused by the accommodation for airplane incursions results in a taking because the owner's ability to use fully the property and keep outsiders away is lost.

Finally, the height restrictions found in these various state airport zoning cases are not ordinary zoning provisions in two important respects. First, these restrictions make the physical invasion feasible by clearing the developable airspace for airplanes. Second, these height restrictions precisely identify the portion of the property that is subject to the invasion. The court below, and others like it, however, seem to think that despite the use of the buildable airspace by third party airports and jet airplanes there can be no physical invasion unless it is accompanied by nuisance-like consequences. The better rule, however, is one that recognizes that there can be a physical invasion *without* collateral nuisance-like damages. By accepting review in this case, this Court can harmonize these various and conflicting state court decisions in a way that fully recognizes the loss of dominion experienced by landowners who cannot utilize their airspace because of the forced acceptance of airport operations and jet airplane overflights.

CONCLUSION

The petition for writ of certiorari should be ***granted***.

DATED: April, 2005.

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